

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MICHAEL A. WHREN AND JAMES L.

BROWN, Petitioners, v. UNITED STATES

CASE NO: 95-5841

PLACE: Washington, D.C.

DATE: Wednesday, April 17, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL A. WHREN AND JAMES L. :
4 BROWN, :
5 Petitioners, :
6 v. : No. 95-5841
7 UNITED STATES :
8 - - - - - X

9 Washington, D.C.

10 Wednesday, April 17, 1996

11 The above-entitled case came on for oral
12 argument before the Supreme Court of the United States at
13 11:24 a.m.

14 APPEARANCES:

15 LISA BURGET WRIGHT, ESQ., Washington, D.C.; on behalf of
16 the Petitioners.

17 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Respondent.

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On behalf of the Petitioners	3
JAMES A. FELDMAN, ESQ.	
On behalf of the Respondent	29

1 P R O C E E D I N G S

2 (11:24 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-5841, Michael A. Whren and James L. Brown
5 v. the United States.

6 Your client has a very strange name. Do you
7 know how it's pronounced? Is it Whren?

8 MS. WRIGHT: It's Whren.

9 CHIEF JUSTICE REHNQUIST: Whren.

10 MS. WRIGHT: As if the H isn't there.

11 CHIEF JUSTICE REHNQUIST: Very well. You may
12 proceed.

13 ORAL ARGUMENT OF LISA BURGET WRIGHT

14 ON BEHALF OF THE PETITIONERS

15 MS. WRIGHT: Thank you, Mr. Chief Justice, and
16 may it please the Court:

17 This case presents a question about when
18 seizures of motorists are unreasonable within the meaning
19 of the Fourth Amendment.

20 In the Government's view, probable cause of any
21 traffic infraction is a floor above which it is per se
22 reasonable to stop any motorist, but the ultimate test
23 under the Fourth Amendment is reasonableness, not probable
24 cause, and given the potential for abuse of a mere
25 probable cause standard in the traffic enforcement

1 context, we believe that the probable cause standard does
2 not automatically strike the appropriate balance in each
3 and every case.

4 To contrast our position in concrete terms, if
5 the floor represents probable cause, or the string hanging
6 from the motorist's rear view mirror, or probable cause
7 that the motorist glanced at his watch or changed the
8 radio station, or probable cause that the motorist
9 signaled for only 2-1/2 seconds rather than 3 seconds
10 before changing lanes, and the ceiling is probable cause
11 is the most serious traffic infraction we can imagine,
12 then under the Government's view, the police have complete
13 discretion anywhere between the floor and the ceiling to
14 make a stop.

15 QUESTION: Let me ask you this, if I may,
16 Ms. Wright. Does the fact that the arresting officer is
17 in plain clothes and in an unmarked vehicle and that the
18 officer's observations are for a supposedly minor traffic
19 offense, do those factors all go into the pot in
20 determining under the Fourth Amendment whether the traffic
21 stop is reasonable?

22 MS. WRIGHT: If --

23 QUESTION: Is there -- is that part of the mix
24 or not, or do we only consider what it is the officer
25 observed without considering the fact that it is an

1 unmarked vehicle and a nonuniformed officer?

2 MS. WRIGHT: I think that if there is a policy
3 that takes in -- that incorporates those sorts of
4 concerns, what car the officer is in, or how the officer's
5 dressed, then I think they are relevant, because the
6 officer, under our view, would have to comply with the
7 departmental policies.

8 QUESTION: You mean a departmental policy?

9 MS. WRIGHT: Departmental, or possibly even
10 within their district.

11 QUESTION: The officer was supposed to be in
12 uniform and in fact he was in plain clothes, then that
13 could be a factor in saying that the stop was not proper?

14 MS. WRIGHT: If there was a policy that said
15 that traffic stops were not ever to be made by
16 plainclothes officers, yes, we think that would --

17 QUESTION: It has to be a policy that is set
18 forth explicitly. It isn't just the common practice.

19 I thought your argument was more than just an
20 explicit policy. I thought that even though the officers
21 were neither prohibited by the letter of the law, nor even
22 by any explicit mandate of their department from making a
23 stop for a technical violation, if, indeed, it was the
24 practice that all of the officers of the department used
25 not to stop for technical violation, that would be enough

1 to render it violative.

2 Isn't that what you were arguing, or is it?

3 MS. WRIGHT: Well, I think that if there is a
4 standard practice, in essence the department has a policy
5 of following that practice.

6 QUESTION: Okay. That's what you mean by a
7 policy, then. You just mean the standard practice.

8 MS. WRIGHT: Practice, correct, in the first --

9 QUESTION: Now, what troubles me about your
10 argument is, it, you know, the woulda-coulda-shoulda
11 argument. I mean, whether it should be -- you know,
12 whether he could have stopped, or would have stopped.

13 To draw the line at would have stopped, that is,
14 to require the officer to be following the standard
15 practice, seems to make a lot of sense if you only apply
16 it in these evidentiary exclusionary cases, where, you
17 know, they stop a car and find drugs, as here, and then
18 try to introduce the drugs.

19 But you can't limit that policy to that. The
20 result of that policy would be that any officer in the
21 whole department who follows the letter of the law but
22 does not follow the general practice of the department
23 stops an innocent motorist, does not find drugs, but the
24 motorist gets mad and says, what do you mean, stopping me
25 for a broken taillight, and then sues the officer under

1 1983, or the department under 1983, and you are guilty of
2 a violation of the Fourth Amendment, isn't that right?

3 MS. WRIGHT: That would --

4 QUESTION: There's no officer in the department
5 can act technically under the law if the rest of the
6 department is being more liberal, and he violates the
7 fourth Amendment if he does that.

8 MS. WRIGHT: That is correct, theoretically a
9 citizen would have --

10 QUESTION: Yes.

11 MS. WRIGHT: -- a civil suit, but I think we're
12 talking about an extremely small number of cases where
13 this is going to happen, because the sort of discretion
14 that's granted even under the would-have test is quite
15 large. We just set the threshold at the level at which
16 there's probable cause of a violation that is -- that the
17 police are authorized to and do, in fact, enforce.

18 QUESTION: But violation of the Fourth Amendment
19 is, you know, to my mind a big deal, and I don't go, you
20 know, tossing it around arbitrarily, and to say that every
21 time a policeman, although he's technically correct in
22 making a stop, is not as liberal as the rest of his
23 colleagues in the department, he thereby violates the
24 Fourth Amendment, does not strike me as true.

25 MS. WRIGHT: Well, I think an analogy might be

1 inventory cases, or drug-testing cases where the Court has
2 relied on standard practice and policy in order to control
3 the discretion, if in Vernonia there was supposed to be a
4 random drawing every week to determine which students
5 would be tested, and if it turned out that that's not what
6 they were doing, and they were selecting students contrary
7 to that policy, I think those students, whether
8 anything -- evidence was turned up or not might --

9 QUESTION: Well, I think your answer to Justice
10 Scalia was candid, and I think is consistent with your
11 position, but I think it exposes some real difficulties.
12 In addition to the ones that the Justice mentioned, it
13 seems to me that this makes certain traffic laws simply a
14 dead letter at the option of the police department.

15 MS. WRIGHT: Well, I think that's already what
16 in effect is happening. It's just recognizing the reality
17 that if this is the practice, then this is the standard
18 practice and the police need to stick within that standard
19 practice in order to have their --

20 QUESTION: But the police don't have the
21 authority to tell the legislature which traffic laws are
22 to be repealed.

23 MS. WRIGHT: Well, it's not that it's repealed,
24 of course, and they can change their policy or practice
25 any time, but there's no -- the notion of full enforcement

1 is really -- there is no -- it's not even a myth any more.
2 Nobody believes that there's such a thing as full
3 enforcement.

4 The legislature doesn't fund the police
5 department to do full enforcement, so it's understood by
6 the legislature that there will be some selectivity in
7 policy, and the notion that -- all we're saying as far as
8 the civil remedy -- I don't think there's anything unusual
9 about the idea that when police act unreasonably, which by
10 definition they are in our situation, that they --

11 QUESTION: You say police are acting
12 unreasonably in your situation. Now, was -- I take it
13 from what you say there's a departure from established
14 department policy in this case.

15 MS. WRIGHT: Correct.

16 QUESTION: What was that departure?

17 MS. WRIGHT: Well, the department has mandated
18 that traffic enforcement shall not be undertaken by
19 officers in unmarked cars or in plain clothes unless
20 there's an immediate threat to the public safety posed by
21 the violation, essentially one that would outweigh the
22 danger that's being posed by a stop by an unmarked car.

23 QUESTION: And so in this case it was a
24 plainclothesman who made the traffic stop.

25 MS. WRIGHT: Correct.

1 QUESTION: Why on earth should that be a
2 violation of the Fourth Amendment, simply to depart from
3 department policy?

4 MS. WRIGHT: Well, if the police are not
5 required to constrain their own discretion by maintaining
6 adherence to their own policies, then because of the
7 unique nature of civil traffic enforcement, and traffic
8 enforcement in general, they will have the same amount of
9 discretion as a practical matter as this Court found
10 improper in Prouse and unconstitutional in Prouse, and
11 that's why there has to --

12 QUESTION: Well, that was total discretion in
13 Prouse.

14 MS. WRIGHT: Well, it's our position that as a
15 practical matter the police really have the same
16 discretion in the civil traffic area, and I don't read
17 the --

18 QUESTION: Well, but can you general -- I mean,
19 we're talking about a holding that would presumably bind
20 courts all over the country. Can you be that sure of what
21 the various police departments all over the country
22 prescribe?

23 MS. WRIGHT: Well, it would -- obviously, the
24 conduct would be judged by whichever policies govern the
25 particular officer, whatever department he was in, and so

1 just as in Florida v. Wells, you know, opening a
2 particular container might be permissible --

3 QUESTION: So if a police department then said
4 that plainclothesmen as well as uniformed police can make
5 traffic stops, then this would have been perfectly all
6 right in that kind of a department.

7 MS. WRIGHT: I think that's correct, assuming
8 there were not other policies that prohibited this
9 particular kind of stop.

10 QUESTION: So a violation of the Fourth
11 Amendment is dependent on what kind of a policy that the
12 particular police department has.

13 MS. WRIGHT: Well, I think that's exactly what
14 this Court said in Florida v. Wells, that a container can
15 be opened in one jurisdiction if there are policies
16 governing that, but not in another.

17 QUESTION: Well, that was an inventory search,
18 which we've always said had to be personal to some sort of
19 a policy, and you say we should carry over that rule here.

20 Wouldn't it in fact, if your view is adopted,
21 wouldn't that lead to pretty elaborate testimony at, say,
22 a suppression hearing as to what the department policy
23 was? Supposing there wasn't any written policy, but I
24 take it your argument isn't limited to that. You could
25 interrogate officers about what was the practice. Would

1 that be permissible?

2 MS. WRIGHT: Yes, it would, but I don't think it
3 would be very difficult.

4 QUESTION: It might not be difficult, but it
5 would be time-consuming.

6 MS. WRIGHT: Not necessarily. I mean, I think
7 that in most cases the issue will be resolved with the
8 officer who made the stop on the stand.

9 QUESTION: As it was in this case. Soto said, I
10 don't do this.

11 MS. WRIGHT: Correct.

12 QUESTION: But suppose instead of having -- the
13 plainclothes people who are supposed to spend their time
14 pursuing big crime and not traffic violations had said,
15 well, we know what we're supposed to do, so they radioed
16 the regular patrol cops, and the same thing happened, is
17 that the whole of your position?

18 It's only that the plainclothes people -- they
19 suspect that there's some drug trafficking but they
20 haven't got probable cause, and they see that this person
21 is not the best driver in the world. They radio the
22 regular cops on the beat, and the regular cops can stop
23 that car.

24 MS. WRIGHT: Well, it would depend on what the
25 policy was as to uniformed, marked patrol cars. There

1 would be a possibility that for the particular violations,
2 or in the particular circumstances, that would also be a
3 deviation from policy. If the violation was a string --

4 QUESTION: Well, if the patrol police that I
5 have in mind, their job is to patrol traffic violations,
6 and that's all they do, so they stop people who are
7 speeding, who go through a red light, don't signal, that's
8 what they do all day, every day. If the plainclothes
9 people simply radio such a car to do the work for them,
10 then your Fourth Amendment claim evaporates?

11 MS. WRIGHT: Well, not if there is a policy that
12 would prohibit or would -- would prohibit the marked car
13 from making a stop, if, for example, the violation was a
14 string hanging from the rear view mirror and the police
15 department had a policy that said, you shall enforce the
16 regulation about objects hanging from the mirror only if
17 it is obstructing the view of the driver.

18 QUESTION: But in your case I take it your
19 answer is that you would lose if what had happened here is
20 Soto radioed a regular patrol car and the regular patrol
21 car said, you weren't paying full attention to your
22 driving, you turned without signaling.

23 MS. WRIGHT: I think -- we don't have a record
24 on that. There's a possibility that if we were to look
25 into the practice with respect to marked cars in the

1 District, that this would violate that policy, but you
2 know, we just don't know the answer to that.

3 But certainly we're talking about situations
4 that are the most egregious laws that are virtually never
5 enforced, or are unenforced, or the officers aren't
6 authorized, so --

7 QUESTION: Supposing you get an officer, the
8 arresting officer on the stand, and you ask him, did the
9 department have a written policy respecting what you did
10 here? The officer says no, the department does not have a
11 written policy. Then you say, does the department have
12 any practice, even though it's not in written form. The
13 officer says no.

14 Well now, you're not bound by his answer at a
15 suppression hearing, are you? Can't you interrogate other
16 officers? Maybe this guy is wrong as to whether there is
17 a practice.

18 MS. WRIGHT: I think that if we could make a
19 proffer, that we could establish that his practice was not
20 representative, or that there was a practice, a judge
21 would let us do it. I don't think that's going to be
22 happening in most of the cases. It would only happen if
23 the officer happens to be one of those officers who is not
24 doing what everyone else is doing.

25 QUESTION: But of course, you don't know that

1 when he's on the stand. You're naturally going to want to
2 prove that he's not doing what everybody else is doing.

3 MS. WRIGHT: We're going to want to try, but I
4 think that this Court can be sure that judges aren't going
5 to permit fishing expeditions any more than they do in any
6 other area, that the judge will use good judgment in
7 deciding what's needed to get to the bottom of the issue
8 and figure out what is the department policy? Was this a
9 deviation so gross as to make the stop objectively
10 unreasonable, and to make --

11 QUESTION: Well, you know, it's not just any
12 deviation in your view, but a gross deviation?

13 MS. WRIGHT: I think that's right, because
14 police have to have discretion to work within a range of
15 conduct.

16 We're talking about a threshold that's just
17 really just a little above probable cause. It's not
18 probable cause of anything, it's probable cause of
19 something that they're actually authorized to enforce and
20 do in fact enforce in the circumstances, and it would
21 depend --

22 QUESTION: It seems to me that it --

23 QUESTION: Why do you make the assumption that
24 anything that is a deviation from the norm is
25 unreasonable? I mean, there are reasonable things that

1 are not the things that the majority does.

2 I mean, it may well be reasonable not to stop
3 cars that just have broken taillights, and that may be the
4 general practice in the particular police department, but
5 that does not automatically make it unreasonable to stop a
6 car that has a broken taillight, and other departments may
7 make that their practice, so why does it become
8 unreasonable within the meaning of the Constitution simply
9 by being atypical?

10 MS. WRIGHT: Well, I think what we're saying is
11 unreasonable is deviating from the policies that govern
12 your conduct. I mean, in some jurisdictions --

13 QUESTION: Well, you're not saying policies that
14 govern. You're just saying policy -- by a policy that
15 governs, you say you don't mean a directive. You mean,
16 what is generally done.

17 MS. WRIGHT: It could be --

18 QUESTION: You just mean a practice. You don't
19 mean a command.

20 MS. WRIGHT: Well, there are standard practices.
21 I mean, I guess what I'm saying is that a department does
22 not have the ability under the Fourth Amendment to simply
23 say, we are not going to act in any rational fashion,
24 we're not going to constrain our discretion, we want to
25 be, arbitrarily want to take every smidgeon of discretion

1 that's given to us by the probable cause standard. We
2 refuse to be limited.

3 QUESTION: No, they can't do that, but they --
4 and they can develop a practice of not stopping cars with
5 broken taillights, and that would be reasonable.

6 But had they developed a practice of stopping
7 cars, all cars with broken taillights, that would also be
8 reasonable.

9 MS. WRIGHT: That's our position.

10 QUESTION: So why is stopping a car with a
11 broken taillight unreasonable?

12 MS. WRIGHT: I --

13 QUESTION: Just because this department as a
14 general practice, though it's not a command, it has chosen
15 the other reasonable thing it doesn't render the other one
16 any less reasonable, does it?

17 MS. WRIGHT: Well, for the same reason in Wells
18 a container opening can vary, and even taking it back
19 farther from the policy, in some jurisdictions it's legal
20 to turn right on red, in other jurisdictions it's not.
21 Stopping someone in one jurisdiction is reasonable under
22 the Fourth Amendment. Stopping them in another is not.

23 QUESTION: Yes, but in the one instance the
24 conduct is criminal, in the other instance it's not. I
25 mean, that's your distinction.

1 What if you had a department in which the
2 practice was that if they were busy or worried about other
3 things they didn't worry -- they didn't stop people for
4 broken taillights, but if they weren't busy, they did stop
5 people for broken taillights.

6 Usually, they're busy. Sometimes late at night
7 they're not. So at 11:00 somebody gets stopped for a
8 broken taillight. What's the practice? How do you deal
9 with that under your standard?

10 MS. WRIGHT: Well, I think you do have to put
11 the reasonable officer in the shoes of the officer who's
12 actually making the stop.

13 QUESTION: Well, that's fine. What does he do?
14 Was it reasonable for my officer to stop at 11:00 because
15 he wasn't busy?

16 MS. WRIGHT: I think so. If that's the practice
17 at that time and under those conditions, then I think that
18 would be --

19 QUESTION: Then every police department in the
20 United States is going to have a policy that says, when
21 we're not busy, we're going to enforce the traffic laws,
22 and your rule isn't going to catch anybody, is it?

23 MS. WRIGHT: Well, that's where the standard
24 practice I think comes in as sort of a backup. I mean,
25 you can't have --

1 QUESTION: Well, that's what the standard
2 practice is going to be. Every police department is going
3 to say, don't waste time on trivia if you're busy. If
4 you're not busy, go ahead and enforce the minutiae, and
5 that's going to be the end of your rule, isn't it?

6 MS. WRIGHT: Well, if they really had the time
7 and resources to actually enforce these trivial violations
8 and actually --

9 QUESTION: Sure. It's 11:00, the streets are
10 empty, one car goes by with a broken taillight. You're
11 going to lose that case if the department has my policy.

12 QUESTION: The policeman has just finished his
13 donut. He's just finished his donut. He's not even --

14 (Laughter.)

15 QUESTION: You lose, don't you, on my
16 hypothetical?

17 MS. WRIGHT: I think you cannot have a token --
18 a token enforcement policy.

19 QUESTION: No, but I'm not talking about a
20 token -- the policy is, if you're not busy, it's entirely
21 proper for you to enforce this stuff, and the officer
22 does. You lose in that case.

23 MS. WRIGHT: If they in fact do do it when
24 they're not busy, yes, we do.

25 QUESTION: Okay. That's not going to give you

1 much protection, is it?

2 MS. WRIGHT: Well, I don't -- I think so,
3 because as a practical matter the kind of violations we're
4 talking about are so -- so petty, and they're seized upon
5 in such unusual circumstances that it's going to be clear
6 to a judge that this is not -- this is outside the --

7 QUESTION: Is there any experience, though, it's
8 not just your guess, Ms. Wright? Are there any States
9 that for their State system have adopted this reasonable
10 officer would have, instead of an officer could have? Are
11 there any States that have it -- the Tenth Circuit divided
12 into -- one said it's unworkable, and the other says it is
13 workable. Do we know what's done in the States?

14 MS. WRIGHT: There is a split in the States as
15 well. I think the NACDL brief gives a pretty good
16 breakdown of the split. There are several supreme courts
17 of States, three or four, I think, that have adopted the
18 would-have, and the many intermediate appellate States and
19 it's not in my understanding that there have been -- and
20 the Government in fact argued in opposition to cert that
21 most stops are upheld. Under the would-have test you're
22 only catching the most egregious situations.

23 QUESTION: Well, you -- I think you said that,
24 too.

25 MS. WRIGHT: Uh-huh. That's correct.

1 QUESTION: That this is just some check, because
2 otherwise probable cause is virtually nonexistent.

3 MS. WRIGHT: Right. We're just catching --
4 we're just catching those situations where, in effect,
5 because the regulation is either not enforced or is
6 essentially unenforced under the circumstances, that the
7 discretion is really the same as in Prouse.

8 QUESTION: It seems to me that the difficulties
9 of enforcing your rule are sufficiently great that it
10 would almost be as easy for you to argue that we should
11 turn to the subjective test, which requires overruling
12 many of our decisions, but it seems to me that's almost
13 more workable.

14 MS. WRIGHT: Well --

15 QUESTION: If we think there's a horrible
16 problem here, we have to do something -- do any States use
17 the subjective test?

18 MS. WRIGHT: Not that I know of. The Ninth
19 Circuit a few years ago I think was still using some
20 subjective language, but no.

21 But I think Your Honor has picked up on exactly
22 the situation that the Government's test is unacceptable.
23 We either need a subjective test or an objective
24 reasonableness test.

25 You know, we understood the subjective test to

1 be foreclosed by the Court's precedents, but I also think
2 our test is far more workable than a subjective -- because
3 it's objective. It's like any other objective
4 reasonableness test.

5 QUESTION: I looked for the words of the reg,
6 and neither you nor the Government quote the operative
7 word. You both say that the reg says that a plainclothes
8 officer should, but that's not in quotes, should, I guess,
9 arrest somebody only in the case of an immediate threat to
10 safety, but if that's really the word of the reg, should,
11 I didn't know what it meant.

12 That is, does it mean that if the officer does
13 happen to stop a person for a taillight, and doesn't think
14 it's an immediate threat, that they throw out the ticket,
15 or they throw out the case, or that the officer is
16 punished, or -- I mean, you might interpret it to say,
17 officer, if you see an immediate threat, go arrest the
18 person. Officer, if you don't see an immediate threat,
19 it's up to you, really. No need to do it.

20 It doesn't say you should not.

21 MS. WRIGHT: Well --

22 QUESTION: It says when you should, and I think
23 most officers would, in fact, believe they have authority
24 to arrest somebody if they see a crime, so -- I'm pointing
25 this out because I don't know what the reg says precisely.

1 I'd like to know.

2 MS. WRIGHT: Well, I'm -- the reg about the
3 unmarked car? I'm --

4 QUESTION: Yes. Yes.

5 MS. WRIGHT: On pages 1 and 2 of our brief we
6 quote --

7 QUESTIONS: It's actually there? Oh, great.
8 Sorry.

9 MS. WRIGHT: -- the relevant section, and it
10 says, under policies, traffic enforcement action may be
11 taken under the following circumstances, and it lists
12 three, and then the fourth section says, on page 2,
13 members who are not in uniform or are in unmarked vehicles
14 may take enforcement action only in the case of a
15 violation that is so grave as to pose an immediate threat,
16 (emphasized) to the safety of others, so we read that
17 as --

18 QUESTION: So they interpret that to mean, and
19 they throw out the arrest, or what do they do?

20 MS. WRIGHT: Well, don't throw out an arrest. I
21 mean, a person couldn't necessarily suppress their
22 presence -- they couldn't beat a ticket under this.

23 QUESTION: Why not?

24 MS. WRIGHT: Because they can't suppress their
25 presence, I guess --

1 QUESTION: It's not a suppression of the
2 evidence.

3 MS. WRIGHT: Right. It would have to be some
4 evidence that had been seized in order to raise any
5 suppression issue, any issue in a criminal case.

6 QUESTION: Well then, you really don't have --
7 to win your case you don't have to go so far as to say
8 that the practice also would suffice.

9 MS. WRIGHT: That's correct.

10 QUESTION: And, indeed, you don't even have to
11 adopt a would-have test. You could say your case comes
12 under the could-have test.

13 MS. WRIGHT: Our case does come under the could-
14 have test as interpreted by some of the courts, which do
15 incorporate an authorization-type requirement --

16 QUESTION: Would -- this officer would be
17 violating department policy, and I suppose would be
18 subject to discipline for having done this, is that right?

19 MS. WRIGHT: He would be subject to discipline.

20 QUESTION: So really, this is a totally -- I
21 mean, I haven't focused on it in this way, but the
22 question you're presenting is whether or not you suppress
23 evidence when seized by an officer in violation of a
24 regulation of a department.

25 MS. WRIGHT: I think certainly that's all the

1 Court has to answer in this case, and what we have here is
2 an administrative scheme, and the police have set up
3 certain policies and procedures of how the administrative
4 scheme is going to be executed, and we can tell
5 objectively from looking at this stop this was not a stop
6 pursuant to that objective --

7 QUESTION: Well, why on earth should the Fourth
8 Amendment incorporate the department policy?

9 MS. WRIGHT: Well, again, I -- we say in our
10 brief, I don't think there would necessarily in every
11 case -- the reg would not be determinative, and let me
12 give this example where there could be reasonable
13 violation of a regulation.

14 If, for example, the regulation did not contain
15 the exception for immediate threats to safety, and my
16 clients had been weaving all over the place and appeared
17 to be drunk or reckless driving, I don't think that we
18 could argue that that could be unreasonable --

19 QUESTION: So there are administrative law
20 cases, Caceres, and so forth, which say certain violations
21 of regs are not bases for throwing out evidence, or
22 suppressing evidence. I'm suddenly seeing the case in
23 that light as a --

24 MS. WRIGHT: Well, I think this case is easy for
25 the reason Your Honor is saying, is that --

1 QUESTION: But Ms. Wright, does the United
2 States v. Caceres -- I think that's the name of the
3 case -- did that speak to this problem?

4 MS. WRIGHT: No, it did not, because in Caceres
5 the Court was very clear that there was no reasonable
6 expectation of privacy, and in fact, no constitutional
7 right implicated at all, so I want to make clear I'm not
8 saying that any regulation that the police happen to have
9 is going to automatically result in suppression, only
10 those that bear on the reasonableness of the officer's
11 conduct.

12 QUESTION: Well, what would be the significance
13 of this case, just taking your narrow view, if the chief
14 of the department comes in and says -- testifies well,
15 yes, it's true they violated that prohibition on
16 plainclothes officers doing that, but the only reason we
17 have that prohibition there is that when plainclothes
18 officers start making arrests, people may not know that
19 they're police officers, and then they fight back, and it
20 gets into a lot of trouble. There certainly was no intent
21 behind the regulation to prevent an arrest being made
22 simply for the sake of preventing an arrest being made.

23 Is that the end of your case, if that's the
24 testimony and it's accepted?

25 MS. WRIGHT: I don't think so, because I think

1 that that is saying we enacted this reg to protect the
2 personal security of motorists, which is at the heart of
3 the Fourth Amendment.

4 QUESTION: Well, no, they said we enacted the
5 regulation among other things to protect the personal
6 security of the officer --

7 MS. WRIGHT: I think it --

8 QUESTION: -- and perhaps to prevent placing
9 motorists in positions in which they might be inclined to
10 fight, but there was no fight here, and the officer didn't
11 get hurt, and you know, we're still going to dock his pay
12 a couple of hours for doing what he did, because we -- you
13 know, we don't want to run these risks, but it has
14 absolutely nothing to do with our view of when it is or is
15 not appropriate to arrest for offenses as offenses.

16 Isn't that the end of your case if that position
17 is accepted?

18 MS. WRIGHT: Well, I don't think so, because the
19 degree of intrusion is -- the manner it's made in is
20 relevant to what the degree of intrusion is and what the
21 citizen's privacy interest is, so you would still have an
22 enhanced citizen privacy interest in a case where an
23 unmarked car was used.

24 QUESTION: Well, if -- that may be, but then
25 you're going beyond that very narrow view in which you say

1 the touchstone would simply be the departmental
2 prohibition.

3 MS. WRIGHT: Well, I think the department -- the
4 judge will have to take into account the violation of the
5 regulation and the entire totality of the circumstances,
6 and I would like to reserve --

7 QUESTION: So there isn't really that narrow a
8 view. It's always going to be ultimately a totality test,
9 even when there is a regulation, and the regulation at
10 least ostensibly prohibits the conduct.

11 MS. WRIGHT: There could --

12 QUESTION: It's still a totality test.

13 MS. WRIGHT: I think there could theoretically
14 be a case where the regulation was violated, but the --
15 but it was -- but if a reasonable officer would have
16 violated the regulation because of the circumstances, then
17 that would pass our test.

18 It all comes down to a basic reasonableness
19 inquiry, and I just -- you know, on a balancing I would
20 just again point out that the kind of cases we're talking
21 about are the marginal cases, where the Government can't
22 really claim much interest, because this is action it has
23 decided not to take.

24 I'd like to reserve the balance of my time.

25 Thank you.

1 QUESTION: Very well, Ms. Wright.

2 Mr. Feldman, we'll hear from you.

3 ORAL ARGUMENT OF JAMES A. FELDMAN

4 ON BEHALF OF THE UNITED STATES

5 MR. FELDMAN: Mr. Chief Justice, and may it
6 please the Court:

7 It's our position that the traffic stop of
8 petitioners in this case was valid, and that the judgment
9 of the court of appeals should be affirmed.

10 Under the Fourth Amendment, a traffic stop that
11 is supported by probable cause, as it was in this case,
12 and that was undertaken in a reasonable manner and scope,
13 as it also was in this case, is valid. In our view, that
14 conclusion follows regardless of the subjective
15 motivations of the officers who made the stop, the
16 internal regulations of the department that divide up
17 duties among different police officers, or the standard
18 police practices that the officers in a given jurisdiction
19 may happen to follow.

20 QUESTION: Mr. Feldman, is there any other area
21 where there is essentially no control over the officers
22 operation for an improper motive? I mean, probable cause
23 really doesn't serve as a meaningful check when probable
24 cause is, I stood too long at a stop light.

25 MR. FELDMAN: I -- well, I would -- I disagree

1 with you about that. I think the question, the historic
2 role of the Fourth Amendment has been not to stand in the
3 way of society enforcing laws that are on the books and
4 are perfectly valid laws.

5 QUESTION: But laws -- usually when you go to a
6 magistrate, you've got a good reason to go after that
7 person. The problem of no control over the discretion of
8 the police officer, the reality that sooner or later most
9 of us are going to commit some traffic violation for which
10 we could get a ticket, I don't know of any other area that
11 works that way, other than --

12 MR. FELDMAN: I --

13 QUESTION: -- traffic violations.

14 MR. FELDMAN: I can't say that I can think of
15 another area, but what we're really talking about is the
16 whole of police work. Police officers are always faced
17 with a choice of what laws they should enforce and what
18 actions they should take --

19 QUESTION: Well then, are you saying that --

20 MR. FELDMAN: -- to enforce those laws.

21 QUESTION: That there's no such thing as a
22 pretextual stop that's offensive to the Fourth Amendment?

23 MR. FELDMAN: I -- yes, I think I am saying
24 that, so long as there's probable cause, and so long as
25 the actions that the police officer take are only those

1 that are authorized by the probable cause that he has.

2 The officer in this case did not have probable
3 cause to search the car initially when he first saw it on
4 the street and therefore couldn't have stopped it and gone
5 through the car to see if he could find any drugs.

6 QUESTION: But Justice Ginsburg's --

7 MR. FELDMAN: He did have --

8 QUESTION: -- concern is a very real one. Since
9 I read the brief, every time I drive my car I think maybe
10 I can be stopped, and I --

11 (Laughter.)

12 QUESTION: It seems to me that the situation is
13 a little bit out of control. I don't know if there's an
14 answer for it.

15 MR. FELDMAN: I --

16 QUESTION: He could fix his taillight. I mean,
17 that might --

18 (Laughter.)

19 MR. FELDMAN: I -- first of all, I think it's an
20 exaggeration to say that everybody at every minute while
21 they're driving are subject to being stopped for a traffic
22 offense. People -- I don't think it's that difficult to
23 generally obey the traffic laws, and I think most people
24 do almost all the time. I think --

25 QUESTION: I think you get the impression from

1 the briefs that the probable cause to stop would exist if
2 a person obeyed the traffic laws for a sufficient period
3 of time.

4 (Laughter.)

5 MR. FELDMAN: Yes, I don't think that that's
6 true, I think -- but I do think that that really presents
7 the key question in this case. The balance in the Fourth
8 Amendment, and it's struck in the text of the Fourth
9 Amendment, which, by the way, petitioners don't print in
10 their brief the relevant text, which is the part that
11 says, no warrant shall issue except upon probable cause.

12 The point of the Fourth Amendment is to say,
13 there is a society's interest in enforcing the law, and
14 there is individual expectations of privacy, and at the
15 point where there's probable cause to believe that a law
16 has been violated, then taking the appropriate
17 investigative or enforcement stop that's predicated by
18 that probable cause is reasonable under the Fourth
19 Amendment.

20 QUESTION: Well, I take you would add that it is
21 not unreasonable to say that a traffic -- a police officer
22 can distinguish between traffic violations which do not
23 appear to suggest any other type of offense and traffic
24 violations which might give evidence of other offense.

25 MR. FELDMAN: I think that there's a -- I agree

1 with that. I think there's a myriad of different
2 circumstances that a police officer may take into account
3 in deciding which traffic laws, which violations of a
4 particular traffic law to enforce, which traffic laws to
5 enforce, or whether --

6 QUESTION: And one of those circumstances, I
7 suppose, is a hunch that this fellow may be a drug dealer.

8 MR. FELDMAN: Well, I actually think -- I think
9 that's right. I think that if you're a drug dealer and
10 you're concerned that a police -- if you have drugs and
11 you're concerned the police might stop you, I think that
12 it's -- you'd be well advised to obey the traffic
13 regulations. If you don't, you're subject --

14 QUESTION: If it's a straight car, yes.

15 QUESTION: No, except that then you'd give rise
16 to a suspicion. This is a very unusual motorist.

17 MR. FELDMAN: I don't believe that that --

18 (Laughter.)

19 MR. FELDMAN: I guess -- I'm not aware that at
20 least under the regulations of the District of Columbia
21 that it would be a violation of obey all of the traffic
22 regulations.

23 (Laughter.)

24 QUESTION: Mr. Feldman, though, one problem I
25 have, I find -- I'm having a little trouble believing that

1 it is reasonable for a policeman to violate the
2 regulations of his own department. Why doesn't that make
3 his action unreasonable?

4 MR. FELDMAN: I think because the reasonableness
5 inquiry under the Fourth Amendment turns on -- as I said,
6 on the balance between society's interest in enforcing the
7 laws and the individual's -- an individual's expectation
8 of privacy. It doesn't turn on the particular practices
9 of a police department, or it doesn't turn on the
10 subjective motivations of a particular policeman.

11 Where a law is violated, society, per se, has an
12 interest in taking the appropriate enforcement action.

13 QUESTION: So I suppose you would say that if it
14 was not a policeman who made this stop but one of the
15 municipality's garbage men who walked over to the car and
16 made this bust, that would be okay, because after all,
17 it's just a local law that has assigned these duties to
18 policemen and other duties to garbage men.

19 MR. FELDMAN: I think that in that case there
20 would certainly first be a question of whether -- if
21 somebody who happens to work for the Government and
22 purports to make a traffic stop does so whether --

23 QUESTION: It would be unreasonable for the
24 garbage man to do that. It's not his job.

25 MR. FELDMAN: There may not be a Fourth -- well,

1 I would start off by saying there may not be a Fourth
2 Amendment incident at all in that case, because if he's
3 just acting -- he happens to be employed by the
4 Government, but happens to pretend that he's a policeman,
5 he's really just a private individual out there -- out
6 there.

7 QUESTION: But he could have been a policeman.

8 I mean, he could have been a policeman. I mean, as far as
9 the Fourth Amendment goes, you say a policeman could have
10 done it. It's just a matter of internal division of
11 authority. It's just the internal regulation. This man
12 could have been a cop. He happens not to be.

13 MR. FELDMAN: Well, I do think that --

14 QUESTION: What difference does it make as far
15 as the Fourth Amendment is concerned?

16 MR. FELDMAN: I do think as a general matter, as
17 far as the Fourth Amendment it doesn't make a difference,
18 and let me say that this Court has repeatedly said, in a
19 number of cases, that the fact that a given enforcement
20 practice does or does not violate State or local law, or a
21 State constitution for that matter, is not itself reason
22 to say that it violates or doesn't violate the Fourth
23 Amendment.

24 QUESTION: Have we upheld under the Fourth
25 Amendment searches conducted by persons not authorized by

1 law to make an arrest or conduct a search?

2 MR. FELDMAN: No, and I'm not aware that those
3 sorts of cases have arisen. I'm not aware of any such
4 case that's arisen, in point of fact.

5 In this case, there wasn't any doubt about the
6 authority of the policeman both under statute and under
7 regulation to enforce the District of Columbia traffic
8 laws.

9 QUESTION: Would it be appropriate for a police
10 department to have a list of rules, a manual, part A and
11 part B. Part A says what all the traffic officers are to
12 do, and they're not to waste their time with people having
13 strings hanging from their mirrors and putting their tire
14 on the line or off the pavement.

15 Then part B says that for the assistance of our
16 drug enforcement officers, all of these things are grounds
17 for stops.

18 Would there be anything constitutionally
19 objectionable in that, in your view?

20 MR. FELDMAN: I think that that -- I think such
21 a regulation probably would be enforceable. It's not what
22 we have here, but it probably would be -- excuse me, not
23 enforceable, but probably wouldn't provide an independent
24 ground to hold a stop illegal so long as there was
25 probable cause to believe that the violation. Now -- that

1 the violation had occurred.

2 Now, if the whole nature of a given offense, and
3 this is a kind of a --

4 QUESTION: No, but you see nothing
5 constitutionally objectionable in the practice that I've
6 hypothesized?

7 MR. FELDMAN: No, because I think -- well, with
8 one caveat that I'll get to.

9 In general, enforcing the law under the Fourth
10 Amendment, giving a traffic ticket to somebody who's
11 violated the law is reasonable under the Fourth Amendment.
12 It's a nonarbitrary action. There's a reason for it,
13 which is, the person violated the traffic stop.

14 Now, if there's a -- if the system of laws in a
15 given jurisdiction shows there's some offense that's
16 defined in such an odd way that it really is just a way to
17 let the officers in that jurisdiction get around --
18 circumvent the requirements of the fourth Amendment and
19 get a drug dealer on less than probable cause, there
20 might be some kind of problem with a statute like that,
21 where the whole thing was just a sham.

22 But short of that, I would not say that -- I
23 don't think there is a problem, and if you start saying
24 that State and local regulations --

25 QUESTION: Well, in my hypothetical, there's a

1 police department regulation, and the statutes are on the
2 books, but it's a sham. It's designed just to help the
3 drug people.

4 MR. FELDMAN: Well, it -- that says that in the
5 view of that police department they're going to try to put
6 their enforcement resources in places where they think
7 that they're most warranted, and I don't think there's
8 actually anything wrong with that practice.

9 In this case, the police officer saw -- was in a
10 high drug area, the police officer saw this car driving
11 erratically, and the police officer perfectly reasonably
12 felt that that was a time when he ought to see what's
13 going on and make sure that the traffic laws are being
14 obeyed, and that's what he did.

15 QUESTION: But Mr. Feldman, I thought that
16 wasn't the case. I thought this officer said, I don't do
17 traffic stops. I did here. The officer I thought was
18 candid about, he would not have done this if he didn't
19 suspect -- without probable cause that there were drugs in
20 that car.

21 MR. FELDMAN: I don't think he ever -- he never
22 said that, actually. What the officer said was, I don't
23 usually do traffic stops. He also said, I do carry a book
24 of traffic tickets with me. He said, I didn't intend to
25 give this driver --

1 QUESTION: Did he explain why they were
2 following this car in the first place?

3 MR. FELDMAN: Yes. He said he was initially --
4 initially, he saw that car stopped at a stop sign for an
5 inordinate length of time with another car behind this
6 car, and thought this is a driver who's not paying
7 attention to what he's doing.

8 As they followed him, as it -- there were two
9 other violations that were committed. He failed to --

10 QUESTION: At what point did the officer say, I
11 followed that car because I suspected --

12 MR. FELDMAN: The initial -- initially he did it
13 because he was stopped at a stop sign for too long a time.
14 That's the only reason the officer gave for why he stopped
15 the car, and --

16 QUESTION: At what point did the officer say, it
17 was before -- it was certainly before the car was stopped,
18 and the car inspected, that the car was being followed
19 because there was a suspicion that it contained drugs?

20 MR. FELDMAN: There were two officers in this
21 case. There's Officer Soto, and I don't recall at the
22 moment the other officer's name. Officer Soto, my
23 recollection of the record is, he never said that.

24 The other officer, when he was called by one of
25 the defendants as a witness, said -- when he was asked,

1 why did you stop the car, he did say reasonable suspicion,
2 but if you look at his testimony, I find it completely
3 ambiguous as to whether he had reasonable suspicion of a
4 traffic violation or reasonable suspicion of something
5 else and that the traffic violation --

6 QUESTION: Is there anything else to explain why
7 Officer Soto, who said, I don't ordinarily do this, would
8 have done it in this case when the traffic violations were
9 not particularly egregious?

10 MR. FELDMAN: There -- I'm not sure how
11 egregious they were. Driving at an unreasonable speed in
12 particular can be thought to be a serious offense.

13 QUESTION: Of course, you really don't care,
14 Mr. Feldman, do you?

15 MR. FELDMAN: No. No. In our --

16 QUESTION: Let's be honest.

17 (Laughter.)

18 MR. FELDMAN: In our view of -- I mean, these
19 are the facts --

20 QUESTION: You said you will allow pretextual
21 stops.

22 MR. FELDMAN: In our --

23 QUESTION: So long as he has a proper reason to
24 stop, pretextual or not, you're don't care.

25 MR. FELDMAN: That's correct.

1 QUESTION: You're just being nice to Justice
2 Ginsburg in trying to give her some reasons why --

3 (Laughter.)

4 QUESTION: -- if you don't like pretextual
5 stops, this might have been okay, but your basic -- the
6 Government's basic position is a pretextual stop is okay.

7 QUESTION: Go back -- could you go back for a
8 second to the other question Justice Scalia asked. Assume
9 pretextual stops are fine. What about a stop that
10 violates the law? I mean, that's what's worrying me about
11 this is.

12 As I went back and looked at the reg, and the
13 predecessor reg, it does seem not just to say, you may
14 arrest someone, plainclothes officer, when you see a
15 special risk. It seems to say, you may not arrest
16 someone, plainclothes officer, in the absence of a special
17 risk, at least when you read it in light of the
18 predecessor statute.

19 So if that's the case, it isn't -- this whole
20 issue's nothing to do with pretextual stops. This is a
21 case in which you have illegal stops.

22 MR. FELDMAN: I think that -- I don't think that
23 it's illegal. It's a violation of an internal police
24 department order.

25 But let me -- there's -- I really have two

1 answers to that question. The first is, as they --
2 somebody has already referred to the case of United States
3 v. Caceres, and in that context the Court specifically
4 noted that there are serious costs that are imposed --

5 QUESTION: But it didn't --

6 MR. FELDMAN: -- when you make every --

7 QUESTION: Let me ask about that case
8 specifically. Let me -- because I -- and I may not
9 remember it correctly, but there might be a difference,
10 judging from that case, between the exclusionary rule and
11 the underlying constitutional violation.

12 MR. FELDMAN: I don't think that -- that case,
13 in fact, involved no constitutional violation --

14 QUESTION: No, it didn't, perhaps not.

15 MR. FELDMAN: -- at all, but --

16 QUESTION: It was simply whether they were going
17 to exclude violations of a reg.

18 MR. FELDMAN: But the -- yes, that's right, but
19 the rationale of that case --

20 QUESTION: Yes.

21 MR. FELDMAN: -- was that if you make every
22 internal order of a Government agency regarding how its
23 people should act for every reason at all, if you make
24 every one of those subject to the exclusionary rule,
25 you're going to severely discourage the agency from making

1 any rules at all.

2 And I would add that in this case, what
3 petitioners -- we mentioned that possibility, that that
4 would be one consequence or one way of looking at
5 petitioner's view in this case, and the answer seems to be
6 that no, there's a whole Fourth Amendment law also of what
7 kinds of rules a police department has to have, and those
8 rules have to be specific, have to be specific enough to
9 guide the discretion of the officers in making traffic
10 stops with respect to each kind of traffic offense, and I
11 would also think the same rules would have to apply in all
12 other areas where police exercise discretion.

13 If a police goes to an open air drug market and
14 is trying to do something about it, and sees a number of
15 people dealing drugs, and picks one of them, I think the
16 defendant under their rule -- I don't see why the
17 defendant couldn't say, well, why did you pick this person
18 and not somebody else, and you have to have a rule to
19 guide that.

20 I think the answer to the problem is that the
21 question of when to enforce a law is not a Fourth
22 Amendment issue. The question is whether you are
23 enforcing a law.

24 QUESTION: Well, supposing, Mr. Feldman, that
25 the defendant in this case, they had found no drugs at

1 all, and he simply came into the court and said, I -- you
2 can't pin this traffic offense on me because I was
3 illegally stopped. It was a violation of the department
4 regulation. What should be the result there?

5 MR. FELDMAN: I -- in that -- where he would go
6 would be to the Bureau of Traffic Adjudication.

7 QUESTION: Yes.

8 MR. FELDMAN: And as far as I know they would --
9 the stop would still be valid. His remedy for
10 violating --

11 QUESTION: They'd say, what Fourth Amendment.

12 (Laughter.)

13 MR. FELDMAN: His remedy would be with the
14 police.

15 But let me make -- I had one other point I did
16 want to raise with respect to Justice Breyer's question,
17 and that is, there are numerous cases where, for instance,
18 State constitutions have been interpreted to extend
19 greater protections than the Federal Fourth Amendment, and
20 therefore, where a police officer's action under State law
21 was illegal, even though under the Federal Constitution it
22 met the standards.

23 Well, this Court's never suggested that all of
24 those cases now are also violations of the Fourth
25 Amendment because they're violations of State law.

1 There's a -- the role, the primary role of State
2 law, and perhaps not the exclusive one, but the primary
3 role of State law is in defining what the offenses are.
4 It's basically Federal standards under the Fourth
5 Amendment that determine whether -- that determine what
6 actions are reasonable, and it's our submission that it is
7 always reasonable to enforce the law -- to enforce the law
8 when you have probable cause to do so.

9 QUESTION: Well, you really don't go that far,
10 because you wouldn't say selective enforcement based on
11 race or religion would be permissible.

12 MR. FELDMAN: Our view would be that those would
13 be unconstitutional --

14 QUESTION: For a different reason.

15 MR. FELDMAN: -- but they would be
16 unconstitutional under the Equal Protection Clause --

17 QUESTION: Right.

18 MR. FELDMAN: -- and there would be different
19 standards applied to them.

20 I think again this case is instructive. In the
21 suppression hearing in this case the officers were asked
22 questions about whether they made the stop because the
23 defendants were black. The officers denied that they had,
24 and I read the judge agreed that those denials were
25 credible.

1 So this is a case where they can't meet the
2 applicable equal protection standard, which is was this
3 action taken because of the race of the defendants, but
4 they want to say, well, no, we can't meet that standard,
5 but the Fourth Amendment imposes more stringent standards.

6 I think our answer to that is that the Fourth
7 Amendment is related to the individual's expectation of
8 privacy, and society's interest in enforcing the law, and
9 it's not a Fourth Amendment defense to say, because
10 society hasn't -- well, I violated the law, or there was
11 probable cause to believe that I did, but because somebody
12 else also violated the law, and it wasn't enforced against
13 that person, then therefore the evidence has to be
14 suppressed and it's an unreasonable search and seizure.

15 I -- the test that's proposed by petitioners
16 would result in very arbitrary results, since police
17 department rules, like the one on which petitioners
18 rely --

19 QUESTION: But Mr. Feldman, does it? I mean,
20 you said that, and the would-have -- this is not a huge
21 requirement, just a difference between could an officer
22 and would a reasonable person, and there are jurisdictions
23 where this would have apprehended is enforced.

24 I haven't -- didn't see in any of the briefs
25 that there's this disarray, this chaos in States that have

1 the would-have standard. I thought it turns out that in
2 most situations would-have would yield the same thing as
3 could-have.

4 MR. FELDMAN: Well, I would point Your Honor's
5 attention to the Tenth Circuit's decision, for instance,
6 when it originally had adopted a, quote, would-have test
7 and moved to a could-have test.

8 And one of the reasons it did was, it reviewed
9 its cases and found that they were all over the lot when
10 courts tried to figure out whose practice is it who we're
11 supposed to look at when we look at standard police
12 practices? Is it this officer, is it the department as a
13 whole, is it the State as a whole, is it the narcotics
14 unit, or the traffic enforcement unit, or who?

15 And then think of all the -- then there are all
16 the different circumstances under which laws could be
17 imposed. After all, a police officer I think reasonably
18 might try to enforce a traffic -- a minor traffic offense
19 when he has nothing else to do, but if there are other
20 demands on his time and attention, he might well choose
21 not to.

22 It just raises all of those problems, and I
23 think it's partly because of -- and inevitably what has
24 happened, and I think you'll find this in the State cases
25 as well as the cases in the Federal courts that have

1 adopted that test, the judge starts looking into just the
2 subjective motivation of the officer -- why did you make
3 the stop? Would you usually have made the stop?

4 I think that's what it generally degenerates
5 into, and, indeed, if you look at the formulation of the
6 would-have test, it's whether the reasonable officer would
7 have committed the traffic stop if he had been
8 motivated -- really, it's if he had been motivated by a
9 desire just to enforce the traffic laws.

10 And really, what it is is, it's just a not very
11 precise way of trying to get a subjective motivation. A
12 long line of this Court's cases have held that subjective
13 motivation is not the touchstone in Fourth Amendment cases
14 in contexts similar to this, and so you can't go look
15 directly at it, but by using things like the rules in this
16 case as a proxy for that, you're both way overinclusive
17 and way underinclusive.

18 One problem is that the disobedience of a rule
19 of the sort that's involved here doesn't necessarily show
20 that the officer was operating under any kind of pretext
21 at all. There may be all kinds of reasons why a rule --
22 for instance, a jurisdiction may have a rule that officers
23 from one precinct can't stop cars in another precinct.
24 There may be all kinds of reasons why an officer would
25 violate that rule that have nothing to do with whether it

1 might be a pretext or not.

2 On the other hand, it's also dramatically
3 underinclusive, because there may be all kinds of cases
4 where officers don't violate rules, but where they decide
5 to enforce the law in a discretionary situation in one
6 case rather than another because of a hunch, or because of
7 a belief that by doing so they may deter some -- or
8 enforce, or find evidence of some --

9 QUESTION: Mr. Feldman, are you saying -- going
10 back to my really basic question, if one has the notion
11 that probable cause doesn't act as the barrier in this
12 area, that it does in others. Your view is, well, that's
13 what we have, and you can't have any probable cause plus,
14 is that --

15 MR. FELDMAN: I would -- that is our view. I
16 think that if the real objection here is that the traffic
17 laws are too hard for people to enforce, and therefore
18 people violate them and subject themselves to traffic
19 stops on a regular basis, then the remedy is with the
20 legislature, which has obviously not passed an appropriate
21 set of traffic laws if that were true. I don't think
22 that --

23 QUESTION: It's not with the laws, it's with the
24 discretion of the police officer.

25 MR. FELDMAN: But I think that the problem is

1 not the discretion of the police officer. There are many
2 laws that are not enforced 100 percent. There are many
3 laws that are only rarely enforced.

4 But in fact, the traffic laws are a good example
5 of where selective enforcement, where enforcing them
6 occasionally, can have a great deterrent value.

7 If you are out on a highway and thinking of
8 violating the speed limit, you can know for a certainty
9 that the police officers don't have the manpower to stop
10 every one of the cars in the heavy traffic around you for
11 that violation, but what you don't know is whether they'll
12 stop you, and that possibility of exactly that kind of
13 occasional enforcement is in fact what the traffic laws
14 depend on.

15 In short, I think that petitioners' arguments
16 are primarily directed towards interests that are not
17 protected by the Fourth Amendment. Insofar as there's an
18 equal protection claim, that claim should be made under
19 the Equal Protection Clause.

20 It didn't succeed in this case, and there's no
21 reason to adopt a more lenient standard under the Fourth
22 Amendment. And insofar as their claim is that the law is
23 just too difficult to obey and subjects too many people to
24 being stopped for traffic violations, that really is a
25 problem with the traffic laws and not -- because perhaps,

1 if that's so, they erect too high a standard for people to
2 obey.

3 But under the Fourth Amendment, where someone
4 is -- where someone -- where the police have probable
5 cause to believe that a statute is violated, or a
6 regulation is violated, then that is all that the Fourth
7 Amendment reasonableness inquiry requires.

8 Thank you.

9 QUESTION: Thank you, Mr. Feldman. Ms. Wright,
10 you have a minute remaining.

11 MS. WRIGHT: If the Court has no other
12 questions, I think we'll rest on our briefs. Thank you
13 very much.

14 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Wright.
15 The case is submitted.

16 (Whereupon, at 12:16 p.m., the case in the
17 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MICHAEL A. WHREN AND JAMES L. BROWN, Petitioners,
v. UNITED STATES

CASE NO. 95-5841

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)